

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



FOR MR. JUSTICE ROSS.

17/00

# TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1926.

No. 4500.

284

LORENZO A. BAILEY, APPELLANT,

*vs.*

CORNELIUS R. SCOTT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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FILED JULY 29, 1926.

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Jan 7, 1927

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# Court of Appeals of the District of Columbia

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No. 4500.

LORENZO A. BAILEY, Appellant,

vs.

CORNELIUS R. SCOTT.

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Supreme Court of the District of Columbia.

Equity. No. 43631.

EMMA AUGUSTA SCOTT, Plaintiff,

vs.

CORNELIUS R. SCOTT, Defendant.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

*Memorandum of Chief Justice McCoy.*

Filed June 3, 1926.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 43631.

EMMA AUGUSTA SCOTT, Plaintiff,

vs.

CORNELIUS R. SCOTT, Defendant.

The application for allowance of counsel fees must be denied on the authority of the decision by Mr. Justice Hoehling in Hines vs. Hines, Equity No. 41619.

Counsel for the defendant has presented an order reading in part: "That this cause be, and the same is hereby abated." No order can be entered herein it being sufficient that the defendant by his counsel has suggested the death of the plaintiff.

WALTER I. McCOY,  
*Chief Justice.*

*Petition for Reconsideration as to Counsel Fees.*

Filed June 14, 1926.

\* \* \* \* \*

This petitioner, Lorenzo A. Bailey, states to the Court as follows:

In January, 1925, the plaintiff, Mrs. Scott, employed this petitioner as her attorney to obtain the relief prayed in the bill herein filed. She was then suffering from tuberculosis in an advanced stage, destitute of means and unable to perform any labor and so continued until her death on May 11, 1926. He accepted said employment relying on this Court to exercise its power to require the defendant, who has abundant means, to pay her counsel fees and costs of suit. The case required of him considerable study and labor for which \$500.00 would be a reasonable fee but he has received nothing on that account.

The plaintiff, in her bill filed February 5, 1925, alleged cruelty and prayed divorce from bed and board and that defendant be required, pendente lite and by final decree, to pay the costs and reasonable sums for her maintenance and counsel fees, and stated that she was without means to pay them. The Court allowed her to proceed in forma pauperis. The Defendant in his answer filed February 20, 1925, admitted that "the plaintiff was without any funds," but denied the cruelty and also denied the validity of the ceremonial marriage as to which latter denial the plaintiff on June 3, 1925, filed her replication setting up estoppel, etc. Upon consideration of the bill and answer and statements made by counsel the Court, by order of February 24, 1925, required defendant to pay to plaintiff \$75.00 per month pendente lite for her care and maintenance which included constant medical treatment but nothing for costs or counsel fees as to which the order is silent. On August 7, 1925, she renewed her application as to costs and counsel fees and stated under oath

3 "that the amount \$75.00 per month allowed by said order for her care and maintenance, has been and is barely sufficient to defray her actual and necessary expenses for board, lodging, medical treatment, medicine, laundry, clothing, etc.; that she therefore has not paid and has been and is unable to pay any amount to her counsel of record herein; that her counsel fees and taxed costs of suit herein therefore remain wholly unpaid and payable."

The defendant, in his answer filed August 12, to the application stated that he was then unable to pay costs or counsel fees and by order of August 12, 1925, the Court denied the application. On April 14, 1926, the case came on for final hearing before the Chief Justice who stated that because of the conceded facts as to the ceremonial marriage he would dismiss the bill but no order or decree has been made to that effect. On April 21, 1926, the plaintiff filed a motion for rehearing and submitted a brief in support thereof but pending action thereon the plaintiff departed this life. Her death was suggested orally to the Court by Defendant's attorney and at the same time her attorney of record suggested orally to the Court to make an order as to his fees.

On May 14, 1926, the Chief Justice invited her attorney to submit a memorandum as to the power of the Court "to order an allowance of Counsel fees in the case notwithstanding the death of the plaintiff." Such memorandum was submitted May 19, 1926.

The Chief Justice in his memorandum filed June 3, 1926, denied the application for allowance of counsel fees and cited as the sole authority for such denial the decision of Mr. Justice Hoehling in *Hines v. Hines*, Equity No. 41619, in which decision the only authority cited is *Zoellner v.*

4 *Zoellner*, 46 Mich. 511, 513, which is not in point. In the *Zoellner* case a decree of divorce was granted in 1872 to the husband plaintiff, who died in 1880 and in 1881 the defendant filed her petition to set aside the decree for fraud in its procurement. The Court denied the petition but said although the plaintiff's death extinguished the suit and the ground of action that "the proceeding itself may survive." Counsel fees were not involved and are not mentioned in the report of that case.

This petitioner, after careful consideration and examination of the authorities and in the light of his experience as a member of this bar, conceives it to be his right and his duty to the Court and to himself and other members of this bar to state that he believes the decision stated in said memorandum of June 3, 1926, to be erroneous and that this Court has full power in this case now to require the defendant to pay a reasonable fee to this petitioner for his services as attorney for the plaintiff:

Wherefore he prays the Court to reconsider his application mentioned in said memorandum of June 3, 1926, and to vacate said decision and to make such order on said application as may be just.

LORENZO A. BAILEY.

L. A. BAILEY,

MADISON L. HILL,

*Attorneys for Petitioner.*

DISTRICT OF COLUMBIA, ss:

5 Lorenzo A. Bailey says upon his oath that the statements in the foregoing petition by him subscribed are true as he verily believes.

LORENZO A. BAILEY.

Sworn to and subscribed before me this 12th day of  
1926.

[NOTARIAL SEAL.]

JOSEPHINE L. G. HILL,  
*Notary Public, D. C.*

\* \* \* \* \*

Received a copy of the foregoing petition and Brief June  
12th, 1926.

WILLIAM E. LEAHY,  
*Attorney for Defendant.*

*Memorandum on Allowance of Counsel Fees.*

Filed June 16, 1926.

\* \* \* \* \*

A memorandum having been filed June 3, 1926, denying the application for allowance of counsel fees to counsel for the plaintiff on the authority of the decision by Mr. Justice Hoehling of this Court in Hines vs. Hines, Equity No. 41619, wherein was cited the case of Zoellner vs. Zoellner, 46 Mich. 511. Counsel for the plaintiff now files a petition for reconsideration as to counsel fees and seeks therein to distinguish the Zoellner case.

The memorandum herein on June 3, 1926, was not based on the decision in the Zoellner case but on the decision by Mr. Justice Hoehling which is to be taken as the law on the point for this Court until a contrary ruling is made by the Court of Appeals.

WALTER I. McCOY,  
*Chief Justice.*

6      *Order Dismissing Petition and Fixing Maximum  
Undertaking on Appeal.*

Filed June 16, 1926.

\* \* \* \* \*

Upon consideration of the petition of Lorenzo A. Bailey herein filed June 14, 1926, it is by the Court this 16th day of June, 1926, ordered and decreed that the said petition be and is hereby dismissed.

WALTER I. McCOY,  
*Chief Justice.*

From the foregoing decree the said petitioner in open court prays an appeal and the maximum amount of the undertaking for costs on said appeal is fixed at \$100.00.

WALTER I. McCOY,  
*Chief Justice.*

*Memorandum.*

June 16, 1926.—Undertaking for costs on appeal approved and filed.

*Designation of Record on Appeal.*

Filed July 16, 1926.

\* \* \* \* \*

The Clerk will please prepare the transcript of record on appeal and include therein the following, viz:

1. Memorandum of Chief Justice filed June 3, 1926.
2. Petition filed June 14, 1926, (omitting brief).
- 7 3. Memorandum of Chief Justice filed June 16, 1926.
4. Order filed June 16, 1926.
5. Memo. showing filing of appeal bond.
6. This designation of record.
7. Assignment of error.

LORENZO A. BAILEY,  
*Petitioner and Appellant.*

Received a copy of the foregoing designation of record July —, 1926.

LEONARD A. BLOCK,  
*Attorney for Defendant, Appellee.*

*Assignment of Error.*

Filed July 22, 1926.

\* \* \* \* \*

The petitioner, Lorenzo A. Bailey, on his appeal from the order of June 16, 1926, assigns as error the denial and dismissal of said petition.

L. A. BAILEY,  
*Petitioner and Appellant.*

8 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 7, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 43631 in Equity, wherein Emma Augusta Scott is Plaintiff and Cornelius R. Scott is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 28th day of July, 1926.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,  
*Clerk.*

By CHAS. B. COFLIN,  
*Assistant Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 4500. Lorenzo A. Bailey, appellant, vs. Cornelius R. Scott. Court of Appeals, District of Columbia. Filed Jul. 29, 1926. Henry W. Hodges, clerk.



COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

SEP 23 1926

IN THE

*Henry M. Hodges*

**Court of Appeals, District of Columbia**

No. 4500

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LORENZO A. BAILEY, *Appellant*,

*vs.*

CORNELIUS R. SCOTT

---

**BRIEF FOR APPELLANT.**

The question involved in this appeal is whether the death of the female plaintiff, before final decree, in her suit for divorce, maintenance and counsel fees, terminates the power of the Supreme Court of the District of Columbia to require the defendant to pay a reasonable sum to her attorney for his services rendered in that suit.

The appeal is from a final order of that Court, denying such power, in the suit of Emma A. Scott *v.* Cornelius R. Scott, who is now the appellee, and dismissing the petition of the appellant seeking such payment.

He now assigns such denial and the dismissal of the petition as errors.

The salient facts in the record are as follows: The appellant was employed by the plaintiff, Mrs. Scott, to obtain for her the relief prayed in her bill, filed February 5, 1925, viz; divorce from bed and board and an allowance to be paid by defendant, *pendente lite* and

under final decree, for costs, her maintenance, and counsel fees. He has abundant means but she was destitute, ill and unable to work and so continued until her death, May 11, 1926, while the case was at issue and still pending. The Court allowed her to proceed in *forma pauperis* and required him to pay, *pendente lite*, \$75.00 per month for her care and maintenance including medical treatment but refused *pendente lite* to require him to pay counsel fees also. Her attorney has received nothing for his services. When her death was suggested orally by counsel for defendant her attorney orally suggested that an order be entered for payment of his fee and upon the invitation of the Court he submitted a brief showing the power of the Court to make such order after her death, but the Court was of a different opinion as indicated by the memorandum of June 3 (Rec. 2). Thereupon, the petition (Rec. 2-4) was filed but the Court by memorandum filed June 16, indicated its adherence to its former opinion and a formal order was entered of record from which this appeal was noted in open court (Rec. 5, 6).

#### POINTS, AUTHORITIES, ARGUMENT.

1. "During the pendency" of the suit the Court had the power under Sec. 975, Code D. C., to require Scott to pay counsel fees "to enable her to conduct her case" and in *Tolman v. Tolman*, 1 App. D. C., 299, 311, and again in *Towson v. Towson*, 49 App. D. C., 45, 47, this Court held that "she is entitled" to such fees without regard to whether or not she succeeds in the litigation and in *Tendler v. Tendler* this Court, May 3, 1926, allowed counsel fees to the plaintiff who failed to prove her marriage. Her claim for counsel fees, asserted

in her bill, is therefore a right which survives after her death under Sec. 243, Code D. C., and her attorney, who remains wholly unpaid, succeeds to that right by subrogation, 37 Cyc. 363-367 and notes 1-11. The Courts are extending the application of the doctrine of subrogation, 37 Cyc. 370-373.

2. Upon careful examination of the authorities the law is found to be stated in 19 CORPUS JURIS, 230, as follows:

“ Upon the death of the husband it has been held that the wife’s action for divorce abates, and the Court thereafter has no authority to award counsel fees. But the death of the wife before the trial of an action by her for divorce has been held not to take away from the Court the power to award counsel fees which have been earned.” Citing *Ballard v. Caperton*, 2 Metc. (Ky.) 412, 414, 415.

In the case last above cited, a wife’s suit for alimony and divorce, the statute provided that:

“ In suits for alimony and divorce the husband shall pay the costs of each party, unless it shall be made to appear in the cause that the wife is in fault and has ample estate to pay the same.”

The Court ordered defendant to pay plaintiff \$150.00 for her support *pendente lite* and the costs of the motion for the allowance. About two months later and before final hearing her death was suggested. Counsel for plaintiff then moved that defendant be required to

pay them a reasonable fee and the costs of the suit, which motion was granted and affirmed. The Court said:

“ That the wife died before a trial does not avoid this liability of the husband so plainly fixed upon him by statute. The fee of the wife’s attorneys is allowable as part of the costs, and as the costs are incident to the suit, the attorneys’ fees with the other items of costs, may be fixed and ascertained by the Court in which the action was brought, even after the death of the plaintiff, or the termination of the suit by a judgment.”

The Kentucky statute above quoted is less liberal than the law in this District so far as relates to counsel fees for a wife plaintiff.

3. The Court has power to allow counsel fees in a divorce case in which the plaintiff has filed an order to dismiss the suit after the parties have become reconciled and resumed cohabitation.

*Courtney v. Courtney*, 4 Ind. App. 221.

*Sumner v. Sumner*, 54 Wis. 642.

*Fullhart v. Fullhart*, 109 Mo. App. 705.

*Beaulieu v. Beaulieu*, 114 Minn. 511.

In the *Courtney* case, *supra*, the statute was to the same effect as our Code, Sec. 975, and the Court declared its power to protect its attorneys by allowance of their fees in such cases “when inequitable results would otherwise follow.”

4. "Counsel fees are often allowed at the beginning of an action and at the time of awarding temporary alimony. But the entire amount need not be fixed at the beginning of the action, as allowances may be made from time to time as the exigencies of the case shall seem to demand." 19 C. J. pp. 229, 230 Sec. 546.

5. In equity "abatement does not, as at law, terminate the suit, but merely suspends all the proceedings therein, so that, on removal of the cause of abatement, the suit may be revived and proceeded with." 1 C. J. 27, Sec. 5, Note 13.

Although the death of plaintiff in a divorce suit extinguishes the suit and the ground of action "the proceeding itself may survive." *Zoellner v. Zoellner*, 46 Mich. 511, 513.

6. After the death of a party the action survives as to a judgment for alimony in gross and as to the rights of third persons. *Masterson v. Ogden*, 78 Wash. 644.

7. The Court was erroneously of opinion (Rec. 2) that it was without power to make any order in the case after plaintiff's death was suggested and that the suggestion operated to abate the suit for all purposes, and based that opinion on the decision of that Court in the *Hines* case which was based on the *Zoellner* case (46 Mich. 511) which did not involve counsel fees but involved the question of power after the death of the husband plaintiff in a divorce case to set aside the final decree on the ground of fraud by him in its procurement.

The Code D. C. provides, Sec. 243, that "No suit in equity shall abate by the death of any of the parties where the rights involved in the suit survive."

The prayer in the bill that defendant be required to pay under Code Sec. 975 for the services of her attorney "to enable her to conduct her case" relates to a right which survives her death and as to that right the suit is not abated.

The attorney who rendered those services is the proper person to exercise that right and the words "during the pendency" of the suit, under Sec. 975, should be construed to include the entire period while his claim remains unsatisfied.

L. A. BAILEY,  
MADISON L. HILL,  
*Counsel for Appellant.*

